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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. CHARLES FRANCIS MARKELL, Defendant and Appellant.	G056207 (Super. Ct. No. 17WF1684) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Michael A. Leversen, Judge. Affirmed.

Gregory L. Cannon, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Arlene A. Sevidal and Joseph C. Anagnos, Deputy Attorneys General, for Plaintiff and Respondent.

* * *

A jury convicted Charles Francis Markell of second degree robbery. Although the trial court instructed the jury on the lesser included offenses of petty theft and attempted robbery, Markell contends the court *also* should have instructed the jury on the lesser included offense of "theft from a person." Finding no basis to reverse the judgment, we affirm.

I.

FACTS

An instructor at a Huntington Beach yoga studio spotted Markell defecating near the studio's entrance. When the instructor told him he could not do that, Markell, who is homeless, became "pretty aggressive," yelled at her, and told her, "I can shit anywhere I want to shit." He yelled at another woman, "What the fuck, you fucking bitch. What the fuck are you looking at?"

The yoga instructor went inside the studio and called security. While holding the door open for students, she used her cell phone to photograph Markell's sleeping bag and his bike with an attached wagon and to send it to security because it blocked the studio's entrance. Markell reached around the door, hit her arm, and took the phone from her hand. He then taunted her, saying, "You want your phone? Come get it." Another woman at the studio tried to grab the phone, but she did not try again because she was scared. Markell rode away on his bike. The police soon found Markell hiding in some bushes and recovered the phone.

The prosecution charged Markell with second degree robbery, and alleged he previously had been convicted of first degree burglary constituting a serious and violent felony, and a prior serious felony.

The trial court instructed the jury on the lesser included offenses of petty theft and attempted robbery. The court declined to give an instruction on grand theft as a lesser included offense because there was no evidence the property at issue was worth over $950.

The jury convicted Markell of robbery, and the trial court found true the attendant allegations. Markell appealed.

II.

DISCUSSION

As noted, the trial court instructed the jury on the lesser included offenses of petty theft and attempted robbery. Markell's sole contention on appeal is the court also should have instructed the jury on the lesser included offense of "theft from a person." We disagree.

A. *Lesser Included Offense Instructions*

"California law has long provided that even absent a request, and over any party's objection, a trial court must instruct a criminal jury on any lesser offense 'necessarily included' in the charged offense, if there is substantial evidence that only the lesser crime was committed. This venerable instructional rule ensures that the jury may consider all supportable crimes necessarily included within the charge itself, thus encouraging the most accurate verdict permitted by the pleadings and the evidence." (*People v. Birks* (1998) 19 Cal.4th 108, 112.) "[A] trial court errs if it fails to instruct, sua sponte, on all theories of a lesser included offense which find substantial support in the evidence." (*People v. Breverman* (1998) 19 Cal.4th 142, 162.) "We independently review a trial court's failure to instruct on a lesser included offense." (*People v. Cook* (2006) 39 Cal.4th 566, 596.)

Theft is a lesser included offense of robbery, which requires the additional element of a taking by force or fear. (*People v. Williams* (2013) 57 Cal.4th 776, 799; Pen. Code, § 211.[1]) Here, the trial court instructed the jury on the lesser included offense of petty theft. Markell argues the court also should have instructed the jury on the lesser

[1] All statutory references are to this code.

included offense of "theft from a person," but he misreads the relevant statutory provisions on theft.

B. *Statutes on Theft Crimes*

This case involves the interplay of two separate statutory schemes on theft — the first enacted by the Legislature, and the second enacted by the public. Before addressing Markell's arguments, it is helpful to review those provisions and how the latter altered the former.

1. Grand Theft and Petty Theft

California's theft statutes divide theft into two degrees, "the first of which is termed grand theft; the second, petty theft." (§ 486.) Grand theft is a wobbler offense punishable as either a felony or a misdemeanor depending on the circumstances. (§ 489; see *People v. Morales* (2016) 63 Cal.4th 399, 404 (*Morales*).) Petty theft is punishable by a fine of up to $1,000 or by up to six months' imprisonment in the county jail. (§ 490.)

Section 487 identifies various types of conduct constituting grand theft. First, subdivision (a) makes it grand theft to steal money, labor, or property with a value exceeding $950. Subdivision (b) makes it grand theft to steal various agricultural and aquacultural products with a value exceeding $250. Subdivision (c), relevant here, makes it grand theft to steal property "from the person of another," *irrespective of the property's value*.[2] Finally, subdivision (d) makes it grand theft to steal either an "automobile" or a "firearm," irrespective of the item's value. "In sum, section 487 makes it grand theft to steal more than $950 worth of anything; more than $250 worth of the crops or critters

[2] Historically, the crime of stealing property from the person was punishable as a felony, even if the stolen item's value was low, because the crime was considered a "more heinous offense than ordinary or common theft—partly by reason of the ease with which it can be perpetrated and the difficulty of guarding against it, and partly because of the greater liability of endangering the person or life of the victim." (*People v. McElroy* (1897) 116 Cal. 583, 584.)

listed in subdivision (b); anything at all from the victim's person; or any cars or guns." (*People v. Romanowski* (2017) 2 Cal.5th 903, 907 (*Romanowski*).)

"Theft in other cases is petty theft." (§ 488.) In other words, "petty theft [is] defined in the negative, by what it [is] not." (*People v. Van Orden* (2017) 9 Cal.App.5th 1277, 1287-1288 (*Van Orden*), rev. granted June 14, 2017, S241574, and dismissed.)

2. Proposition 47

In 2014, California voters altered the above statutory framework by passing Proposition 47, the Safe Neighborhoods and Schools Act, which downgraded several nonviolent drug- and theft-related crimes from felonies to misdemeanors unless the offense was committed by certain ineligible defendants.[3] (*Harris v. Superior Court* (2016) 1 Cal.5th 984, 988; *Morales*, *supra*, 63 Cal.4th at p. 404.) One of the main purposes of Proposition 47 "was to reduce the number of prisoners serving sentences for nonviolent crimes, both to save money and to shift prison spending toward more serious offenses." (*Romanowski*, *supra*, 2 Cal.5th at p. 907.)

Among the statutory changes implemented by Proposition 47 was the enactment of section 490.2, which provides: "*Notwithstanding Section 487 or any other provision of law defining grand theft*, obtaining any property by theft where the value of the . . . personal property taken does not exceed nine hundred fifty dollars ($950) shall be considered petty theft and shall be punished as a misdemeanor." (§ 490.2, subd. (a), italics added.) This "broadly reduced punishment for 'obtaining any property by theft'

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[3] Defendants with prior convictions for sexually violent offenses, lewd acts with a child under age 14, and other specified offenses are ineligible. (See § 490.2, subd. (a).) As "[t]he summary of the proposition's purpose and intent . . . stated, 'In enacting this act, it is the purpose and intent of the people of the State of California to: [¶] (1) Ensure that people convicted of murder, rape, and child molestation will not benefit from this act.'" (*People v. Montgomery* (2016) 247 Cal.App.4th 1385, 1391.)

where the value of the stolen information is less than $950." (*Romanowski*, *supra*, 2 Cal.5th at p. 906.)

Section 490.2 thus "redefined" and "expanded the offense of petty theft.'" (*Van Orden*, *supra*, 9 Cal.App.5th at pp. 1287, 1288.) It effectively "abolished the former theft regime that utilized property categories (e.g., cars and avocados) and replaced it with an entirely value-based regime—the $950 threshold. . . . [It] eliminate[d] any previous categorization of thefts, such that all theft offenses—regardless of whether the statute setting out the theft explicitly identified it as grand or petty—must be considered petty if the offense involves property worth $950 or less." (*Id.* at pp. 1291-1292.)

Thus, although Proposition 47 did not expressly amend section 487, it implicitly rewrote it. Before Proposition 47, "[s]ection 487 . . . made it 'grand theft' to steal automobiles, as well to steal 'from the person of another.' (§ 487, subds. (c)-(d).) These forms of theft previously required no evidence of the value of the stolen property. Now they do." (*Romanowski*, *supra*, 2 Cal.5th at p. 911.) "[A]fter the passage of Proposition 47, 'obtaining any property by theft' constitutes petty theft if the stolen property is worth less than $950. Of course, section 487, subdivision (a), already made it grand theft to steal property worth over $950. But various other theft provisions carved out separate categories of grand theft based on the type of property stolen, with either a lower value threshold or no value threshold at all. These are the provisions that Proposition 47 modified by inserting a $950 threshold." (*Id.* at p. 908, fn. omitted.)

C. *Application*

Here, Markell took property (a cell phone) from the person of another. Before the enactment of Proposition 47, that conduct would have constituted grand theft under section 487, subsection (c), irrespective of the item's value. Proposition 47, however, amended section 487 by transforming theft of property "from the person of another" from grand theft to petty theft, *unless* the property in question is worth over

$950, or *unless* the offense is committed by certain ineligible defendants. (§ 490.2, subd. (a).) Here, there was no evidence the cell phone was worth over $950, and there is no indication Markell was ineligible for section 490.2's benefits. Thus, Markell at most was entitled to — and the jury properly received — a lesser included offense instruction on petty theft.

Markell contends the trial court also had a duty to instruct on the lesser included offense of "theft from a person." He argues section 490.2 does not amend section 487, subdivision (c), but rather supplies an alternative sentencing scheme for theft. He further argues the crime of "theft from a person" is its own distinct form of theft, separate and distinct from petty theft and grand theft. We disagree.

The relevant statutory framework does not indicate an additional crime exists for "theft from a person" outside the parameters of sections 487 and 490.2, nor does it support Markell's argument that section 490.2 merely creates an alternative sentencing scheme. To the contrary, section 490.2's introductory language — "[n]otwithstanding Section 487 or any other provision of law defining grand theft" — makes clear that section 490.2, *when applicable*, takes precedence over the preexisting statutory provisions that otherwise would have determined whether a particular theft was grand or petty. (See *People v. Superior Court* (*Romero*) (1996) 13 Cal.4th 497, 524 ["[n]otwithstanding any other law" language in statute eliminated potential conflict with other statute].) That introductory language operates to save section 490.2's "ameliorative operation . . . against interference from other statutory provisions defining certain conduct as grand theft." (*People v. Page* (2017) 3 Cal.5th 1175, 1186.)

In sum, the trial court properly instructed the jury on petty theft as a lesser included offense. Markell was not entitled to an additional instruction on "theft from a person" as a lesser included offense because no such separate offense exists under the applicable statutory framework.

D. *Harmless Error*

Although the trial court was not required to instruct the jury on a lesser included offense of "theft from a person," any error in this regard was harmless.

"The erroneous failure to instruct on a lesser included offense generally is subject to harmless error review under the standard of *People v. Watson* (1956) 46 Cal.2d 818, at pages 836-837. . . . Reversal is required only if it is reasonably probable the jury would have returned a different verdict absent the error or errors complained of." (*People v. Rogers* (2006) 39 Cal.4th 826, 867-868, fn. omitted.) "In determining whether a failure to instruct on a lesser included offense was prejudicial, an appellate court may consider 'whether the evidence supporting the existing judgment is so *relatively* strong, and the evidence supporting a different outcome is so *comparatively* weak, that there is no reasonable probability the error of which the defendant complains affected the result.' [Citations.]" (*Id.* at p. 870.)

Here, it is not reasonably probable that the absence of a "theft from a person" instruction affected the outcome of the jury's deliberations. The jury received an instruction on the lesser included offense of petty theft, but they nevertheless convicted Markell of the greater offense of robbery. Because they ultimately found Markell employed force or fear to take the cell phone, Markell cannot show a reasonable probability of a more favorable outcome had the trial court instructed the jury on a lesser included offense of "theft from a person." Had that instruction been given, the result almost certainly would have been the same.

III.

DISPOSITION

The judgment is affirmed.

ARONSON, J.

WE CONCUR:

O'LEARY, P. J.

FYBEL, J.